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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BEN TURNER,

Defendant and Appellant.

E049183

(Super.Ct.No. FSB900922)

OPINION

APPEAL from the Superior Court of San Bernardino County. Brian S. McCarville, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Ben Turner appeals his conviction for residential burglary. (Pen. Code, § 459.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At defendant's trial, the victim testified she returned home to her apartment on the evening of February 10, 2009, after running errands between 5:00 p.m. and 6:00 p.m. and discovered someone had broken into her apartment. The door had been pushed off the hinges into the apartment. A 42-inch flat screen television was missing, and there was a handprint on a second television inside the master bedroom. However, a fingerprint examiner testified the print was not suitable for comparison, so no match could be found.

The victim's next door neighbor testified she heard four loud noises while walking from the laundry room to her apartment. She then saw a large African-American man holding a flat screen television above his head. He was headed toward her from the area near the victim's apartment and passed by her very quickly. She was not able to identify the man in photographs because he went by her too quickly. She ran to her apartment, intending to dial 911, but she saw a second African-American man coming out of the victim's apartment, and he said to her, "If you call the police, you're in trouble." This second man also made a gesture underneath his clothing, which could have been his finger or some type of weapon. She quickly closed her door, but she said her husband went outside to follow the man carrying the television.

Two 12-year-old girls who lived in the apartment complex were talking near the parking lot and recalled seeing two African-American men carrying a flat screen television to the parking lot, putting it into the back of a vehicle, and driving away. One of the girls, I.D., described the vehicle as "like a family truck." The other girl, E.C., said

the men put the television into the back of an Explorer and drove away with a Jeep Cherokee style vehicle driving behind it. This second vehicle was purple with gold trim.

I.D. identified defendant in a photographic lineup as one of the men she saw with the television, but she was not able to identify him at trial. E.C. identified defendant during trial and in a photographic lineup. She also said she recognized defendant as someone known as Slim, who used to live at the apartment complex. E.C. recalled a total of four men, three who were involved in carrying the television and putting it into the vehicle, and another man, who was standing near the Explorer looking around nervously. Although none of the men spoke to her, E.C. testified defendant looked at her in a mean, aggressive manner.

The manager of the apartments recognized defendant as a former resident of the complex. Defendant lived in one of the apartments with a woman named Paris. They moved out prior to the burglary, but she continued to see them driving or walking around the apartment complex. She was also aware of the vehicles defendant drove. One was an older model, light blue four-door sedan, and the other was a maroon-colored Jeep Cherokee with pin stripping.

In his own defense, defendant testified he was in his own apartment at the time of the burglary watching his own children, as well as his sister's children. Defendant said he watches his sister's children from 11:00 a.m. until 7:00 p.m.

During cross-examination, defendant was impeached by the prosecution with two prior convictions for possession of cocaine for sale. In response, defendant testified he "was rehabilitated" and had decided he would no longer sell cocaine. When asked how

he generated income, defendant said he had been watching his sister's children and was "pending social security." Defendant said he and his wife continued to visit the apartment complex "from time to time" after he was evicted because they had friends there. He also admitted to having a burgundy-colored Jeep Cherokee and a blue Monte Carlo sedan.

Defendant testified he knew the two girls who identified him as one of the burglars at trial. He believed they testified against him in retaliation for a prior incident in which he threatened to tell their parents if they did not stop unplugging a power cord he had running into the laundry room when his electricity was turned off before he moved out. He admitted some people knew him by the nickname, Slim.

The jury convicted defendant of residential burglary. (Pen. Code, § 459.) In a bifurcated proceeding, the court found true an alleged prior prison commitment within the meaning of Penal Code section 667.5, subdivision (b).

On July 28, 2009, the court sentenced defendant to a total of seven years in state prison. To reach the total term, the court imposed the upper term of six years plus one year for the prison prior.

DISCUSSION

On September 8, 2009, defendant filed a notice of appeal. We appointed counsel to represent defendant on appeal. Appointed counsel on appeal has filed a brief under *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth the facts and procedural history, raising no specific issues, and requesting this court to conduct an independent review of the record. On March 8, 2010, we granted

defendant an opportunity to file a supplemental brief. Defendant filed a supplemental brief on April 7, 2010.

In his supplemental brief, defendant contends he did not commit the burglary and was wrongfully convicted because he was misidentified by the eyewitnesses. He argues he received ineffective assistance of counsel because several different attorneys worked on his case prior to trial, and his trial attorney only took over the case 12 days before his trial was scheduled to begin. As a result, he believes his trial attorney did not have enough time to interview witnesses and prepare his defense. He also contends his counsel was ineffective because she did not call certain witnesses on his behalf and did not adequately challenge the ability of the eyewitnesses to see and identify the suspects. Defendant believes his wife and sister should have been called as alibi witnesses to show he was taking care of the children when the crime occurred.

Defendant's ineffective assistance of counsel allegations are all based on matters outside the record on appeal. Ineffective assistance of counsel claims based on matters outside the record on direct appeal are more appropriately raised in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) We must therefore reject defendant's ineffective assistance of counsel claims.

We have concluded our independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.